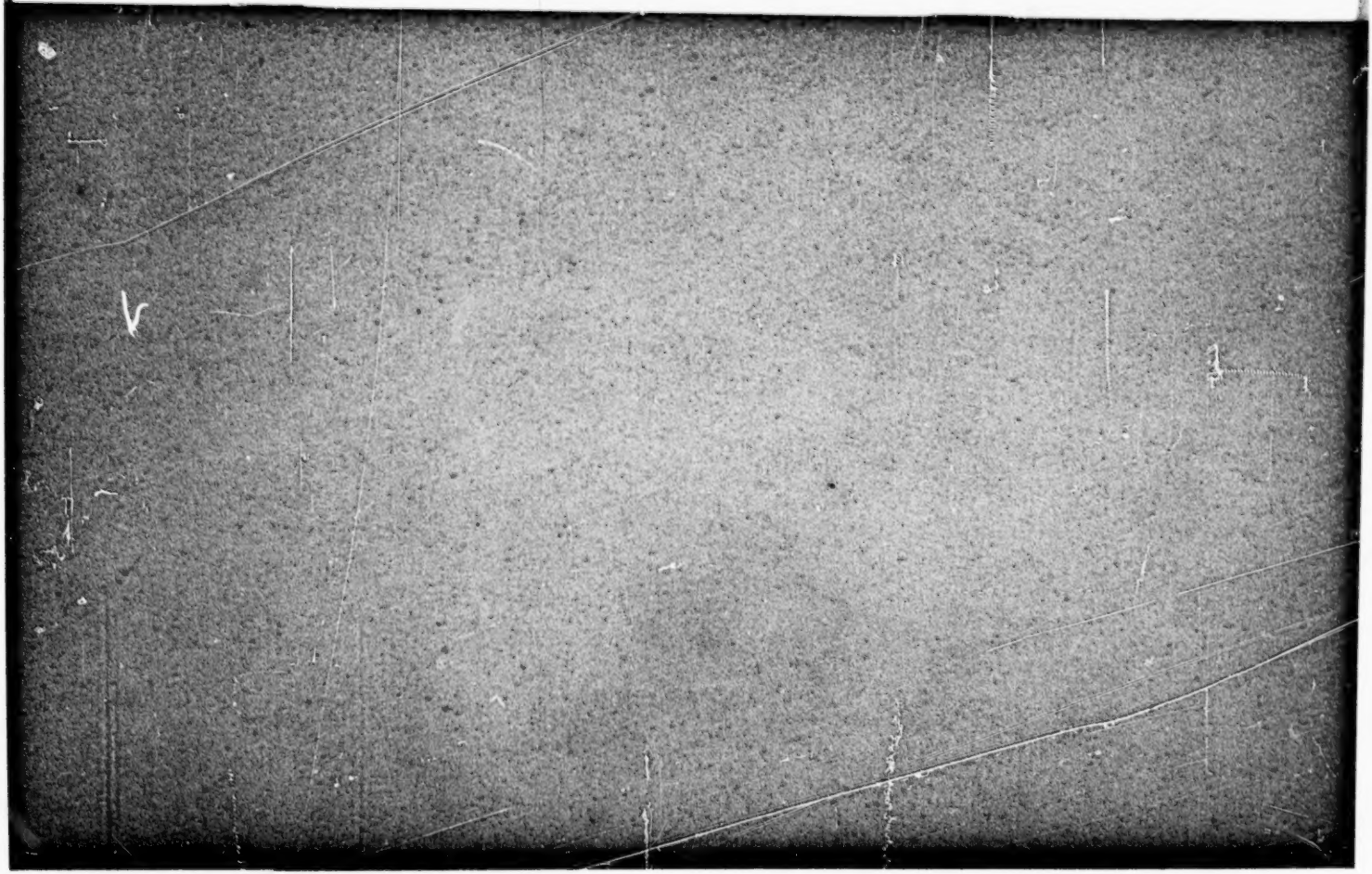

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In the Supreme Court of the United States

OCTOBER TERM 1974

No. 74-24

JOHN M. ENGLAND, Trustee in Bankruptcy for SUNSET DODGE,

Petitioner,

vs.

CHRYSLER CORPORATION, CHRYSLER MOTORS CORPORATION and VAN NESS DODGE, INC.,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari

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THE COURTS BELOW HAVE NOT BEEN SHOWN TO HAVE DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES.

This is a common garden-variety antitrust case. Even counsel possessing great ingenuity and resourcefulness failed to discover in it any legal issues of sufficient significance to warrant review by this Court. The petition merely reargues the facts of the case under the guise of a contention the thrust of which is simply that this Court should eliminate judgments n.o.v. and new trials.

But the rules providing for judgments n.o.v. and new trials are an integral part of the "accepted and usual

course of judicial procedures" and it is petitioner, by urging their elimination, who would have the Court depart from these procedures.* Petitioner's claims have been rejected by the trial court, by the three judges constituting the panel of the Court of Appeals, and by the thirteen judges of that court in rejecting the suggestion for a rehearing en banc. Examination of the trial court's opinion and of the opinion of the Court of Appeals (attached to the Petition as Appendix A and B, respectively) provides a conclusive negative answer to the questions presented in the petition. (Pet. 3) Nothing in the petition demonstrates a need for this Court to devote any of its severely limited time to a reexamination of the unanimous judgment of all of these judges.**

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*The Seventh Amendment, which defines the parameters of the right to trial by jury, explicitly provides that ". . . no fact tried by a jury shall be otherwise reexamined in any Court of the United States, *than according to the rules of the common law.*" (emphasis added) Judgments notwithstanding the verdict have been and are recognized at common law, and thus are consistent with the Seventh Amendment. 5 *Moore's Federal Practice* para 50.07[1] at 2354. Courts have universally held that the practice of granting judgments n.o.v. is constitutional. *Manaia v. Potomac Elec. Power Co.*, 268 F.2d 793 (4th Cir. 1959), *cert. denied*, 361 U.S. 913 (1959).

Moreover, the grant of judgment notwithstanding the verdict in a proper case, as here, has been held to be one of the historic safeguards of the right to trial by jury. *Capital Traction Co. v. Hof.*, 174 U.S. 1, 13, 14 (1899) ("Trial by jury . . . is a trial by a jury . . . in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and . . . to set aside their verdict if in his opinion it is against the law or the evidence."); *Herron v. Southern Pacific Co.*, 283 U.S. 91, 95 (1931); *Christie v. Callahan*, 124 F.2d 825, 827 (D.C. Cir. 1941).

**Rule 19(1) of this Court's Rules, upon which this petition purports to be grounded, "refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the federal judicial process." (Frankfurter and Hart, Supreme Court at October Term, 1933, 48 Harv. L. Rev. 238, 274 (1934)). See, also, *Forsyth v. Hammond*, 166 U.S. 506, 514-515 (1897). And as this Court said in *United*

On the contrary, the petition shows on its face that it is patently defective for it fails to establish that even if the inferences which petitioner contends the jury could have drawn were drawn, they would be sufficient to support a verdict that Chrysler violated the antitrust laws and that Sunset as a proximate result was caused damage to its business or property. The petition does not cite a single decision by this or any other court. Instead it bandies about labels which only confirm the lack of foundation for the petition. Thus, "dual distribution" is not a violation of the Sherman Act—although a jury might well be misled by a clever plaintiff into thinking so. (Pet. App. A, p. xiii) Nor is this a case of an unlawful "price squeeze" for neither Chrysler nor Van Ness possessed the necessary dominant or controlling share of any market. See, *United States v. Aluminum Co. of America*, 148 F.2d 416, 425, 436-437 (2nd Cir. 1945).* Nor does this case involve price-fixing or any other type of conduct proscribed by the Sherman Act.

What Sunset tried to do is make an antitrust case out of competition between a factory-owned automobile dealership and an independent dealership. It has studiously ignored the controlling facts fully documented in the pains-

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States v. Johnston, 268 U.S. 220, 227 (1925): "We do not grant a certiorari to review evidence and discuss specific facts." Moreover, in the realm of factual review and analysis, the rulings of the courts below are treated with respect and entitled to great weight. In that regard, this Court has stated: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. v. Linde Prods. Co.*, 336 U.S. 271, 275 (1949).

*The undisputed facts show that at the relevant time Dodge sales amounted to 5.8% of the relevant San Francisco metropolitan market, and Van Ness' sales to .9%. During this period, Chrysler's total share was 15%. (Exs. QQQ, 258, 9-A, Cornaglia Tr. 836; Pet. App. A, p. viii)

taking opinion of the trial court, who heard all the evidence (Pet. App. A), that (1) both dealerships, as pointed out above, were insignificant factors in the San Francisco market in which they were selling along with numerous other auto dealers and totally lacked any power to influence prices or terms of sale, and (2) Sunset's failure was due entirely to the improvident and fraudulent practices pursued by its partners.

But in any event, as the Court of Appeals said, "A business which through aggressive sales tactics intensifies competition is not to be lightly condemned." *England v. Chrysler Corp.*, 493 F.2d 269, 273 (9th Cir. 1974). See, also, *Panotex Pipe Line Co. v. Phillips Petroleum Co.*, 457 F.2d 1279, 1289 (5th Cir.), *cert. denied*, 409 U.S. 845 (1972). While a jury may be susceptible to a well orchestrated appeal to its emotions in a case of competition between a large and a small business, its verdict is not the last word on the sufficiency of evidence to establish an antitrust violation. Where, as here, the evidence does not establish conduct of the kind condemned by the antitrust laws—as opposed to the jury's notions of proper competition—the verdict is properly set aside.

The necessity for the safeguard provided by the trial and appellate courts' review of the evidence to test its sufficiency has long been accepted.* The instant petition confirms it. For it shows how skillful counsel, by liberal resort to catchwords and elusive shifting of premises, can create the appearance of evil where none in fact exists. Jurors are not only susceptible to this kind of verbal legerdemain, but in an area like the antitrust laws, which is almost totally outside of the scope of their normal experience, they are peculiarly without defense against it. (See Pet. App. A, p. iii)

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*See p. 2, note, above.

*Fourteen judges have heretofore concluded in two well-*considered opinions, applying indisputably correct standards (Pet. App. A, pp. ii-iii; 439 F.2d at 273, note 5), that this is a case calling for the exercise of the trial court's power of supervision over jury verdicts. Nothing in the petition does other than confirm that conclusion. In the following sections we deal briefly with petitioner's specific evidentiary claims.

1. The Alleged Operation of Van Ness "Without Regard to Profits."

The first category of evidence on which petitioner relies to attack the judgment below is that which dealt with the unprofitable operation of Van Ness Dodge. The substance of the evidence, as described by petitioner, is that losses were incurred as the result of what petitioner characterizes as "the profligate advertising and sales policies at the dealership" and "despite the alleged attempts of Chrysler to correct these policies." (Pet. 14) Because, according to petitioner, Chrysler should be presumed to be capable of operating any dealership at a profit if it wants to, this evidence is said to be sufficient to support a finding of an unlawful purpose.

But, as the Court of Appeals correctly points out and petitioner does not dispute, "Sunset did not show that Chrysler was relatively less concerned with Van Ness' profitability than with its power to produce retail profits." (493 F.2d at 273-274) The undisputed evidence shows that Chrysler consistently endeavored to turn Van Ness into a profitable dealership.* Neither the lack of success of these

*Thus, in January 1964, Chrysler's Dealer Enterprise Division performed an audit at Van Ness Dodge which disclosed various deficiencies. In March 1964 Chrysler's Dealer Enterprise Operations Manager directed that "appropriate corrective action [be] taken" and that he be informed when it was accomplished. (Ex. 89)

endeavors, nor petitioner's criticism of Van Ness' management, constitutes evidence from which a jury may infer that Chrysler intentionally operated Van Ness *"without regard* to profits" and hence acted with a "predatory intent."

2. The Alleged Existence of "Countervailing Wholesale Profits".

Petitioner, recognizing that the unprofitable operation of Van Ness itself could in any event support no adverse inference unless shown to have been carried on for the purpose of producing greater wholesale profits to Chrysler (Pet. 15), contends that the Court of Appeals "took no account of such evidence." (Pet. 16) But petitioner's attempt to show the existence of such evidence—which is so much double-talk—collapses of its own weight. (Pet. 16-18) Petitioner cites not one shred of evidence proving that it was profitable for Chrysler to operate Van Ness at a loss because increased wholesale sales would produce profits exceeding any retail losses. (See 493 F.2d at 274)*

A further examination was made at Van Ness Dodge between May 26 and June 8, 1964, reflected in a report which specified various deficiencies to be taken up with the dealer (Ex. 88).

In November 1964, a further analysis was made at Van Ness Dodge and this was taken up with Robert White, the then contractual dealer, who "has assured [Chrysler] that he will review all automobile transactions with extreme diligence to avoid a reoccurrence of this nature". (Ex. 280)

The effort to supervise and control the operation of Van Ness Dodge continued in 1965 and 1966 (Exs. 194, 195, 33). For example, in 1966 Chrysler's Branch Manager advised the then dealer, Loopstra, of "the importance of reducing the loss . . . [and] that if he couldn't get the job done, someone else would . . .". (Ex. 33; see also Exs. 34, 194, 195)

As for the bonus contract with Van Ness' manager, while it provided for a fixed bonus based on volume, it also provided for a bonus of 25 percent of operating profits without limit, thus creating, contrary to petitioner's suggestion (Pet. 15, 25), a greater incentive to achieve profit than volume. (Ex. 81)

*The only evidence cited is to the effect that losses from Chrysler's retail *truck* operation (which has nothing to do with Van Ness in any case) *exceeded* the incremental wholesale profits! (Pet. 16)

Petitioner, in the facile fashion which characterized his presentation of the case to the jury, neatly shifts his premise by contending that the "jury was entitled to infer that Chrysler would not continue the operation of Van Ness at tremendous losses for a period of five and one-half years unless it was receiving compensating benefits." (Pet. 17) That statement, which is nothing more than a truism, reveals petitioner's true position stripped of all of the rhetorical window dressing—that Chrysler should be held liable simply because its dealership operated at a loss while competing with Sunset. But the law does not support that position and the undisputed facts establish that the "benefit" to Chrysler from taking over the Van Ness dealership in the first instance and maintaining it in the face of substantial losses was that it was the only way in which Chrysler could meet its vital and legitimate need to be represented on Van Ness Avenue, San Francisco's auto row. (Ex. 9-A; Pet. App. A, p. vi)

3. Proof of Alleged "Volume Forcing" or "Misdelivered Shipments".

Petitioner charges the Court of Appeals with dismissing "evidence concerning the delivery of huge numbers of *unordered* vehicles to Sunset." (Pet. 18, emphasis added) There is, however, no evidence of a single car delivered to Sunset which had not been ordered—and petitioner's discussion cites none. (Pet. 18-19)

The undisputed evidence out of the mouths of Sunset's own witnesses established that, in the case of the first of the two shipments at issue, Sunset had submitted written orders but one of Sunset's partners claimed later to have orally cancelled them; when Chrysler was advised of the mixup concerning this order, it immediately cancelled the pending order, but Sunset nonetheless went right on order-

ing cars, indicating that it felt no problem existed. (Small Tr. 536-538, 556, Cornaglia Tr. 780-781, 785, 786, 805-807, 865-866) As for the second instance, Sunset merely asked that deliveries of a group of cars it had ordered be spread out and Chrysler attempted to comply by diverting excess deliveries. (Small Tr. 563-565, Ex. 8-D; Pet. App. A, pp. x-xi)

The fact is—and it is undisputed—that, far from having cars forced on it, Sunset set out to sell a thousand cars per year (Exs. II, JJ, p. 1; Small Tr. 490, 629), and that is just how many it ordered and received from Chrysler and sold. (Ex. 258) Van Ness, on the other hand, sold considerably fewer cars—less than 70 percent of Sunset's volume. (Ex. 258)

4. Proof of Alleged "Use of Advertising to Force Sunset to Sell Cars at Van Ness' Prices and Terms".

Petitioner engages in a purely abstract discussion the substance of which is that because, according to the way he computes the figures, Van Ness for some months spent more money on advertising than Sunset, the jury should be allowed to draw an inference of antitrust violation. This, according to petitioner, is so for two reasons—

> one, that this "forced" Sunset to spend more for advertising than was otherwise justified, and
>
> two, that it "forced" Sunset to meet uneconomic terms of sale.

As for the first point, all that the evidence showed was that the Sunset partners, after seeing Van Ness' ads, claimed to have increased their advertising expenditures. (Small Tr. 583, Cornaglia Tr. 802) But this surely is insufficient to support any adverse inference where, as here,

there is no evidence whatever of any coercion or pressure exerted by Chrysler or Van Ness on Sunset. There was not even evidence that Sunset ever complained or otherwise communicated with Chrysler or Van Ness about the volume of advertising or that Chrysler or Van Ness had any reason to know that their advertising expenditure had any effect on Sunset. (Pet. App. A, pp. ix-x)

The absurdity of petitioner's contention is illustrated by the fact that from the *first month* in which Sunset spent money on new car advertising until May 1964, it was Sunset that outspent Van Ness:

*New Car Advertising Expenditures**

	Sunset	Van Ness
October 1963	$4,966	$4,713
November 1963	3,752	2,807
December 1963	4,442	3,662
January 1964	4,293	3,453
February 1964	4,750	3,195
March 1964	5,495	6,517
April 1964	5,139	4,717

(Mendelson Tr. 1530-32, Ex. CCCCC)

No measure of manipulation of figures can make the record evidence support the inference petitioner urges, namely, that Chrysler "*forced* Sunset to spend more for advertising than was otherwise justified. . . ." (Pet. 22, emphasis added) On the contrary, it was Sunset which from the outset of the dealership, set the pace. (Pet. App. A, pp. ix-x) That Chrysler did not force Sunset "*to meet* . . . uneconomic terms of sale" is discussed in the following section.

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*Sunset opened for business on September 11, 1963. During that partial month, what it spent on advertising consisted largely of the opening allowance contributed by Chrysler. (Pet. 21, n.3)

5. Proof of Alleged "Sales Below Cost and on Uneconomic Terms".

There is no question that during the relevant period Van Ness operated at a loss. But petitioner cannot expand the scope of permissible inference from that fact by passing it off under the pejorative label of "sales below cost". The essential point is that there is not even a scintilla of evidence from which it could be inferred that what Chrysler or Van Ness did forced Sunset to sell at lower prices or on more uneconomic terms than it otherwise would have—and nowhere in the petition is such evidence even claimed to exist. (Pet. App. X, pp. viii-ix)

There is no need to belabor this point. All of the relevant evidence was produced by Sunset itself, and it is undisputed. Small, one of the Sunset partners, testified that when the business started he expected to receive a gross profit of "approximately $350" per new car. (Tr. 585-586) The exhibits produced by Sunset's own accounting witness show that this is approximately what Sunset did receive throughout its existence and that it was always considerably *below* Van Ness' gross profit per car:

Comparison of Van Ness and Sunset Gross Profit (Markup) Per New Unit Sold at Retail (PNUR) (Tr. 1724-30; see also Tr. 1558-61; Ex. 307)

Year	Sunset	Van Ness	Difference
1963	$349 PNUR	$380 PNUR	$31
1964	$343 PNUR	$381 PNUR	$38
1965	$335 PNUR	$371 PNUR	$36

These are the figures produced at the trial by petitioner itself. Petitioner's instant effort to dissipate their effect on petitioner's essential contention that Chrysler or Van Ness coerced Sunset with respect to its prices and terms of sale is bootless.

Reduced to its essentials, the undisputed evidence produced by Sunset itself established that *from the beginning of its dealership* Sunset spent more on new car advertising than Van Ness, sold new cars at the markup which it had set out to obtain and which was always less than Van Ness', and sold as many cars as it had set out to sell which was always considerably more than Van Ness sold. The courts below properly concluded that there was no basis here for inferences that would support a verdict against defendants.

THE CONDITIONAL GRANT OF A NEW TRIAL WAS WITHIN THE TRIAL COURT'S DISCRETION.

As discussed above, the petition fails to demonstrate the existence of substantial evidence to support the jury verdict. What it does demonstrate is that the trial court, who heard the testimony and observed the witnesses, could reasonably conclude that the respondents were entitled to at least a new trial. This determination is one for the trial court's discretion and deference should be accorded to the superior position of the trial court to weigh and appraise the evidence. *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080, 1085 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

CONCLUSION

For the reasons stated, the petition should be denied.

Dated at San Francisco, California, August 22, 1974.

Respectfully submitted,

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